

Exhibit 35

**Excerpt of
Opposition to Motion for Evidentiary Hearing and
Cross-Motion for Judgment on the Pleadings;
Memorandum of Points and Authorities in Support Thereof**

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m. L. n.
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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,

Petitioner,

v.

ARTHUR CALDERON, Warden, California
State Prison at San Quentin,

Respondent.

CAPITAL CASE

No. CV 91-0682-DT

OPPOSITION TO MOTION FOR
EVIDENTIARY HEARING AND
CROSS-MOTION FOR JUDGMENT
ON THE PLEADINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Hearing: June 29, 1998
Time: 10:00 A.M.
Before the Honorable
Dickran Tevrizian

Table of Contents

	<u>Page</u>
1	
2	
3	
4	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION
5	TO MOTION FOR EVIDENTIARY HEARING AND CROSS-MOTION FOR
6	JUDGMENT ON THE PLEADINGS ON 38 CLAIMS 3
7	INTRODUCTION 3
8	APPLICABLE LAW 3
9	OVERVIEW OF PETITIONER'S TRIAL 6
10	THE PROSECUTION'S CASE AGAINST PETITIONER 7
11	Defense Counsel's Guilt Phase Defense Closing Argument 8
12	Overview Of Penalty Phase Defense Presented At Trial 40
13	CLAIMS FOR RELIEF 47
14	Claim 1. Discriminatory Charging Practices 47
15	a. Racially-Based Discriminatory Charging Practices 48
16	b. Defendant Age-Based Discriminatory Charging Practices 49
17	c. Victim-Gender-Based Discriminatory Charging Practices 50
18	d. Defendant-Gender-Based Discriminatory Charging Practices 51
19	Claim 2. Arbitrary Charging Practices 64
20	Claim 3. Ineffective Assistance Of Counsel For Failure To Challenge Discriminatory, Arbitrary And Capricious Charging Practices 71
21	Claim 4. Failure To Disclose Material Evidence (Samuelson) 78
22	Claim 5. Knowing Use Of Perjured Testimony (Samuelson) 108
23	Claim 6. Improper Use Of Government Agent 114
24	Claim 7. Ineffective Assistance Of Counsel Regarding Informant Testimony 117
25	Claim 8. Ineffective Assistance Of Counsel At Guilt Phase Regarding PCP Use 127
26	Claim 9. Ineffective Assistance Of Counsel At Penalty Phase Regarding PCP Use 136
27	Claim 10. Ineffective Assistance Of Counsel At Guilt Phase Regarding Alcohol Intoxication 140
	Claim 11. Ineffective Assistance of Counsel at Penalty Phase Regarding Alcohol Intoxication 141

1 impermissible new rule of law in violation of Teague v. Lane, 489
2 U.S. 288 (1989).

3 D. Claim 4. Failure To Disclose Material Evidence
4 (Samuelson)

5 In petitioner's fourth claim for relief (pet. at 31-44),
6 he alleges that the prosecution failed to disclose fully the
7 benefits given to witness Bruce Samuelson in exchange for his
8 testimony, thereby denying petitioner his rights in violation of
9 the Fifth, Sixth, Eighth, and Fourteenth Amendments. In
10 particular, petitioner alleges that witness Bruce Samuelson
11 falsely testified as to the scope and nature of the benefits he
12 received from the prosecution in exchange for his testimony, and
13 that the prosecution failed to correct this false testimony at
14 the time it was made.

15 In support of this legal claim, petitioner specifically
16 alleges that Bruce Samuelson was asked during his trial testimony
17 what "in exchange for agreeing to testify" he had "been offered
18 . . . from the San Joaquin County District Attorney's office."
19 (Pet. at 35:19-20, 36:1-2.) In response, Samuelson testified
20 that the district attorney's office had stated that it "would
21 recommend a one-year county jail sentence with a felony
22 conviction" as opposed to "[g]oing to state prison." (Pet. at
23 36:3-7.) Petitioner further alleges that, on cross-examination,
24 Samuelson agreed with defense counsel that he had been "given a
25 promise by the prosecution" for "a recommendation" of a sentence
26 of "a year in the county jail." (Pet. at 36:9-15.)
27

1 In support of the allegation that this was false
2 testimony, which should have been disclosed to him, petitioner
3 alleges that "contrary to Samuelson's sworn testimony which went
4 uncorrected by the District Attorney, there was an agreement
5 between the District Attorney and Samuelson . . . which later was
6 verified in court on the record at a December 14, 1982 municipal
7 court hearing . . . that four felony charges pending against
8 Samuelson would be dismissed in exchange for his testimony
9 against petitioner and that Samuelson's sentence would be one
10 year and it would be served locally at the county jail." (Pet.
11 at 38:13 - 39:1 emphasis original.)

12 The warden has both admitted and affirmatively alleged in
13 his answer to this claim the following facts: The warden has
14 admitted that at the time of petitioner's trial, Bruce Samuelson
15 was a prosecution witness against petitioner and that in exchange
16 for his testimony against petitioner, the San Joaquin County
17 District Attorney's Office negotiated a plea agreement with Mr.
18 Samuelson. The warden further has admitted that the terms of the
19 plea agreement were put on the record in open court in Mr.
20 Samuelson's case in Municipal Court for the Stockton Judicial
21 District in San Joaquin County on or about December 14, 1982.
22 The warden further has admitted that pursuant to that on the
23 record agreement, the district attorney agreed to dismiss 4 of 6
24 pending felony charges and to would recommend that Samuelson
25 receive felony probation and jail time of no more than one year.
26 The warden further has admitted that at the time of Samuelson's
27 testimony at petitioner's trial on or about March 29, 1983, he

1 testified that the district attorney's office had stated that in
2 exchange for his testimony against petitioner it "would recommend
3 a one-year county jail sentence with a felony conviction" as
4 opposed to "[g]oing to state prison." The warden further has
5 admitted that on cross-examination, Samuelson agreed with defense
6 counsel that he had been "given a promise by the prosecution" for
7 "a recommendation" of a sentence of "a year in the county jail,"
8 and that his case had been put over until April 11, 1983, for a
9 probation violation order to show cause and "for a pre-trial
10 conference." Except as admitted above, the warden has
11 specifically and generally denied all other additional
12 allegations in claim 4.

13 The warden also has affirmatively alleged in response to
14 claim 4 that as part of the plea agreement placed on the record
15 in Municipal Court in Samuelson's case on December 14, 1982, the
16 terms of the plea agreement were not guaranteed to Samuelson. In
17 particular, the warden has affirmatively alleged that Mr.
18 Samuelson was specifically advised by the judge at that hearing
19 as to the non-binding nature of the agreement under California
20 law as follows: "[i]f the Superior Court Judge in Superior Court
21 decides after reading the probation report that he doesn't wish
22 to give you a year in county jail, but wanted to send you to
23 state prison or to give you some harsher treatment than that, you
24 would have a right to [withdraw your plea and] return here to
25 this court."

26 The warden further has affirmatively alleged that these
27 on-the-record admonitions to Mr. Samuelson correctly articulate

1 the rule of law in California that the prosecution has no power
2 to guarantee any criminal defendant any particular disposition of
3 criminal charges as part of a plea agreement because the all plea
4 dispositions must be approved by a judge before they can be
5 carried out and that the judge has the power to reject the plea
6 agreement should the judge find the terms of the agreement
7 inappropriate.

8 One simple answer to petitioner's claim is that it is
9 legally and factually false. Under California law, a prosecutor
10 is without the power to bind the trial judge to any negotiated
11 disposition. The trial judge retains the discretion to reject
12 any negotiated plea agreement made by the prosecution anytime the
13 judge finds the proposed sentence is too lenient. Thus, the
14 prosecutor could not as a matter of law have guaranteed Samuelson
15 a one year county jail sentence, given the possibility that the
16 sentencing judge could reject it as too lenient.

17 This undisputable fact of California law is supported by
18 the very evidence that petitioner relies upon to advance his
19 claim that Samuelson's proposed one-year county jail sentence was
20 guaranteed. As noted in the municipal court transcript attached
21 as Exhibit F to the amended petition and affirmatively alleged as
22 true in the answer, the municipal court judge in Samuelson's car
23 theft and forgery case specifically advised him that his
24 negotiated plea was not guaranteed: "[i]f the Superior Court
25 Judge in Superior Court decides after reading the probation
26 report that he doesn't wish to give you a year in county jail,
27 but wanted to send you to state prison or to give you some

1 harsher treatment than that, you would have a right to [withdraw
2 your plea and] return here to this court. . . ." (See Pet. at
3 245-49, 246:27 - 247:3.)

4 Apart from this simple and dispositive defect in
5 petitioner's claim, petitioner cannot obtain relief on this claim
6 for the equally simple reason that he cannot meet the legal
7 standard needed to obtain relief. Even if petitioner's
8 allegations were assumed true for the sake of argument only, they
9 fail to meet the test of materiality that defines the
10 constitutional duty of prosecutors to turn over to the defense
11 exculpatory or impeachment evidence.

12 Under the Due Process Clause of the Fourteenth Amendment,
13 a state prosecutor has a duty "to assist the defense in making
14 its case," by producing to the defense before and during trial
15 both exculpatory and impeachment evidence. United States v.
16 Bagley, 473 U.S. 667, 675 n.6, and 676, 105 S. Ct. 3375, 87 L.
17 Ed. 2d 481 (1985); United States v. Agurs, 427 U.S. 97, 107, 96
18 S. Ct. 2392, 49 L. Ed. 2d 342, (1976). This does not mean,
19 however, that prosecutors have a "'duty to report sua sponte to
20 the defendant all that they learn about the case and about their
21 witnesses'" that "might have helped the defense or might have
22 affected the outcome of the trial." United States v. Agurs, 427
23 U.S. at 109-110, id. at 112 n.20.

24 Instead, if a prosecutor is in possession of evidence that
25 is "highly probative of innocence," he "is presumed to recognize
26 its significance even if he has actually overlooked it" and is
27 under a constitutional duty to turn it over to the defense. Id.

1 at 110. The duty therefore exists only "if the omitted evidence
2 created reasonable doubt that did not otherwise exist, [and]
3 constitutional error has been committed." Id. at 112.

4 When the absence of the undisclosed evidence from the
5 trial creates reasonable doubt that did not otherwise exist, the
6 failure to disclose "'undermine[s] confidence in the outcome of
7 the trial,'" Kyles v. Whitley, 511 U.S. ___, 115 S. Ct. 1555,
8 1565, 131 L. Ed. 2d 490, 506 (1995) and requires a new trial. On
9 the other hand, "[i]f there is no reasonable doubt about guilt
10 whether or not the additional evidence is considered, there is no
11 justification for a new trial." United States v. Agurs, 427 U.S.
12 at 112-113.

13 Assuming but not conceding the truth of petitioner's
14 allegations, petitioner's claim is that the prosecutor failed to
15 disclose to the defense that he had actually guaranteed, not just
16 promised to "recommend," that Samuelson would not be sent to
17 state prison, as opposed to county jail, in exchange for his
18 testimony. Thus, in petitioner's view, the undisclosed
19 distinction between a guaranteed county jail sentence and a
20 recommended county jail sentence prison could reasonably be taken
21 to put the whole case in such a different light as to undermine
22 confidence in the verdict and create reasonable doubt as to the
23 jury's finding of guilt that did not otherwise exist.

24 The warden disagrees. On this record, any alleged
25 undisclosed distinction between a guaranteed county jail sentence
26 and a recommended county jail sentence for Samuelson's testimony
27 cannot be neither "highly probative of innocence," United States

1 v. Agurs, 427 U.S. at 110, nor does it "create[] reasonable doubt
2 that d[oes] not otherwise exist," id. at 112, with respect to the
3 jury's finding of guilt. In other words, the allegation does
4 nothing to "'undermine[] confidence in the outcome of the
5 trial.'" Kyles v. Whitley, 115 S. Ct. at 1565.

6 A close examination of Samuelson's actual testimony
7 reveals that defense counsel focused his entire cross-examination
8 of Samuelson on laying the evidentiary foundation for his
9 eventual argument to the jury that Samuelson was a savvy
10 jailhouse lawyer who had fabricated his testimony, based on talk
11 going around in the jail and his own special knowledge of
12 criminal law, in an effort to curry favor with the prosecution
13 and to avoid going to state prison for up to 13 years in his own
14 pending criminal cases. Given the evidence presented and the
15 arguments based thereon, there is absolutely no reason to believe
16 that the alleged "guaranteed" county jail sentence would have
17 made one bit of difference in the jury's finding of guilt.

18 Bruce Samuelson testified at petitioner's trial on March
19 29, 1983. (RT 2271.) At the time of trial, Samuelson testified
20 that he was 22 years old and first met petitioner in April 1982
21 in the maximum security section of the San Joaquin County Jail.
22 At the time of this meeting, Samuelson was serving a one-year
23 sentence for two second-degree felony burglary convictions. (RT
24 2331.)

25 Samuelson had certain jail privileges at the time that
26 allowed him to deliver to petitioner in the maximum security
27 section pens and envelops from another inmate. Samuelson made

1 two such deliveries to petitioner before he was transferred out
2 of county jail to an honor farm. Samuelson was released from the
3 jail on June 2, 1982. (RT 2332.)

4 On November 3, 1982, Samuelson was arrested in Arizona for
5 a California charge of possession of a stolen vehicle. Samuelson
6 was returned to Stockton, California, and charged with one count
7 of vehicle theft, two counts of receiving stolen property, and
8 three counts of forgery. At the time of Samuelson's testimony on
9 March 29, 1983, he testified that all but one of the six charges
10 were still pending against him. He further testified that while
11 one of the forgery charges was no longer pending against him, he
12 had been in custody continuously since he was arrested on
13 November 3, 1982 until the time of his testimony on March 29,
14 1983, and that his next court date on the charges was set for
15 April 11, 1983. (RT 2332-33, 2373.)

16 Samuelson further testified that in exchange for agreeing
17 to testify against petitioner, Samuelson had been offered by the
18 district attorney's office a one-year county jail sentence
19 recommendation, as opposed to a state prison sentence
20 recommendation. (RT 2341-42, 2371.) Samuelson further testified
21 that, with good time work time credits, he expected to actually
22 serve only six months in county jail. (RT 2372.) He also
23 testified that he was also on probation for his two prior
24 burglary convictions, and had been told and expected that his
25 then-pending and unresolved probation violation on those
26 convictions would either be dismissed or go on record as a
27 violation without him being sentenced to state prison. (RT

1 2372.) Samuelson testified that he previously had waived five
2 months county jail time on his burglary convictions in order to
3 avoid going to state prison for three years, but that he still
4 "doubt[ed] it very seriously" that he would be sentenced to state
5 prison on the unresolved probation violation. (RT 2346-48,
6 2372.) Samuelson further testified that he had been in custody
7 outside San Joaquin County ever since he came forward, and that
8 he did not expect to serve as a sentence on his pending charges
9 any further county jail time in San Joaquin County. (RT 2372-
10 73.)

11 On November 10, 1982, Samuelson was returned to Stockton,
12 California, and placed in protective custody in the maximum
13 security section in cell-block eight. Samuelson was first placed
14 in cell 14 and then, because of a "nonuseable" sink and toilet,
15 Samuelson was placed three hours later in cell 12, across from
16 petitioner's cell, cell 10, at an angle. The distance between
17 petitioner and Samuelson was about four and a half feet. The
18 cells are staggered at 30 to 45 degree angles across from one
19 another. (RT 2333-34, 2342.)

20 Samuelson and petitioner greeted each other, and on or
21 about November 11th after Samuelson had returned from court,
22 Samuelson and petitioner began "to discuss some technicalities
23 about [petitioner's] case." Samuelson was acting as his own
24 attorney at the time and discussed with petitioner possible
25 "actions on behalf of the defense [in petitioner's case] to
26 exclude certain witnesses." (RT 2335.)

27

1 Beginning around the 15th of November 1982, and continuing
2 for approximately two weeks thereafter, petitioner told Samuelson
3 about how he killed Terri Winchell. (RT 2340.) Samuelson
4 testified that petitioner told him^{12/} that he received a
5 telephone call from his cousin, who was going to meet with the
6 victim. Petitioner further stated that approximately a half hour
7 later, he received another telephone call his cousin, this time
8 from the Weberstown Mall area, who had picked up the girl and was
9 en route to the house. (RT 2336.)

10 Upon arrival at the house, one of the females at the house
11 was asked to go purchase some liquor or something else at the
12 store, and petitioner had prepared to go out with a small thin
13 belt he was wearing, a kitchen knife, and a hammer. They then
14 left in the car via city streets through town northbound towards
15 Lodi until they reached the outskirts of town outside of hearing
16 distance from anyone else. Petitioner told Samuelson that they
17 drove out that distance to avoid detection. (RT 2336-37.)

18 As they were driving, petitioner attempted to strangle the
19 victim with his belt, but it broke. As petitioner first
20 attempted to strangle her, she tried to grab it and pull it away.
21 She was making noises, screaming for help, and eventually fell

22 12. Petitioner's defense counsel moved to exclude
23 Samuelson's testimony concerning petitioner's admissions on the
24 grounds that the statements were hearsay, and that Samuelson,
25 because he was a witness in custody testifying "for leniency or
26 favors," he was incompetent to testify without a preliminary
27 finding of fact concerning his credibility. The trial court
overruled both objections, stating that the statements were
admissible under California Evidence Code section 1220, subject
to cross-examination by defense counsel concerning Samuelson's
credibility. (RT 2335:18 - 2336:8.)

1 forward and passed out unconscious. Petitioner grabbed her hair
2 and pulled her back and started beating the back of her head with
3 a hammer. Petitioner could not remember how many times he hit
4 her with the hammer, but it was several blows, severe blows to
5 the back of her head. (RT 2337-38.)

6 After about 15 minutes went by from the time they had left
7 town until the last blow to the head, petitioner told his cousin
8 to pull over and stop the car. Petitioner then took her body out
9 of the car and dragged her by her feet face down across the
10 pavement and into a field. Petitioner then thought to himself
11 that there was "no use wasting a good piece of ass" so he decided
12 to "bone it." Petitioner then raped the victim. (RT 2338.)

13 Since petitioner's intent "to begin with" was to kill the
14 victim, petitioner "wanted to make sure" she was dead, so he then
15 stabbed her four times. Petitioner didn't really know if she was
16 alive at that point. He then got up, started to walk away, but
17 then turned around and called her a "fucking bitch." (RT 2338-
18 39.)

19 During this time, petitioner's cousin had been driving
20 around keeping watch for any persons in the area. Petitioner
21 then met his cousin at the car and threw the weapons and the belt
22 into the trunk of the car. They returned to the house where
23 there were two girls, Raquel and Pat. Petitioner dumped the
24 purse on the table, (RT 2339-40), and went to hide the belt, and
25 to wash the hammer, knife, and car. They first cleaned the
26 weapons, then they went outside and used a hose and some rags.

27

1 (RT 2339.) One of the girls went outside with petitioner and
2 questioned him why he was using the hose. (RT 2339-40.)

3 Petitioner put one of the weapons, the knife, in the
4 refrigerator. He also took eleven dollars from the purse and
5 used it to buy two packs of cigarettes, a six-pack of beer, and
6 some wine. (RT 2340.)

7 While in custody, petitioner and Samuelson discussed a
8 book called "Prescription Murder" that involved a case in Texas
9 where a doctor had killed his first wife by injecting his wife
10 with a cultured mixture containing feces that went undetected,
11 and attempted to kill his second wife with an injection of
12 procaine hydrochloride. Petitioner asked Samuelson if there was
13 any way Samuelson could get released "OR" or on bail and assume
14 the same situation with one of the girls, particularly Raquel.
15 Petitioner told Samuelson that he would probably find Raquel
16 living with her parents and younger sibling in Woodbridge, and
17 that if she wasn't there, she had relatives strung out from
18 Stockton or Woodbridge to Los Angeles. Petitioner told Samuelson
19 that he did not know where Pat was living but that Samuelson was
20 probably smart enough to find out for himself. (RT 2340-41.)

21 On cross-examination, defense counsel elicited admissions
22 from Samuelson that he was living in the Stockton area in the
23 early part of 1981, and that by March of that year, he was in
24 custody on a petty theft charge at the same time petitioner and
25 Rick Ortega were in custody and having their preliminary hearing.
26 Samuelson admitted that there was talk in the jail about Morales
27 and Ortega being held for on murder charges, but denied being

1 privy to any of those conversations or having any curiosity about
2 the case. In Samuelson's words: "I don't like to become familiar
3 with too many cases other than my own." (RT 2343-45, 2345:11-
4 12.)

5 Defense counsel further elicited admissions from Samuelson
6 that, after his release on the 18th of April, he was back in
7 custody on the 28th of May on four counts of burglary. Counsel
8 then elicited an admission from Samuelson that the district
9 attorney's office had sought a three year state prison sentence,
10 until Samuelson's Youth Authority parole officer recommended that
11 he be recommitted to the Youth Authority. Samuelson then
12 admitted that he was rejected by the Youth Authority as
13 unamenable before the trial judge gave him another "break" by
14 sentencing him to a year in county jail contingent on Samuelson
15 waiving all of the five months he had already served in county
16 jail. Samuelson admitted that pursuant to that plea agreement,
17 he waived all credit for time served in custody prior to October
18 1, 1981, and served time in county jail from that date to June 2,
19 1982, and then was released on probation on certain terms and
20 conditions. (RT 2345-49.)

21 Defense counsel then got Samuelson to admit that after he
22 was arrested and put back into custody in November 1982 on the
23 car theft and forgery charges, he was also charged with a
24 probation violation on his burglary convictions that was still
25 pending. Defense counsel then got Samuelson to admit that on both
26 the new charges and the probation violation, he was facing as
27 much as 13 years in state prison. (RT 2349-52.) Defense counsel

1 then asked Samuelson if the circumstances of his two case
2 suggested to him that he was "certainly headed for prison," but
3 Samuelson would only concede that he "was not sure" he was headed
4 for prison and that he thought he still had a 50/50 chance of
5 beating the charges against him acting as his own attorney with
6 a court-appointed advisor. (RT 2352-53.)

7 Defense counsel then elicited admissions from Samuelson
8 that he had seen in petitioner's cell piles of police reports and
9 transcripts, and Morales had made mention of them. Samuelson
10 further admitted to defense counsel that he had been shown some
11 of petitioner's reports and had actually held and read "a couple
12 of sentences" in either a criminalist's report from petitioner's
13 case, or the criminalist's preliminary hearing testimony
14 concerning semen and blood typing. Defense counsel also got
15 Samuelson to concede that he had read a page in petitioner's
16 preliminary hearing transcript concerning someone seeing
17 something in the house and someone else saying it was not there.
18 (RT 2353-58.)

19 Samuelson further admitted to defense counsel that at some
20 time while he was in county jail he had "free roam" of the jail
21 that was not afforded to others because he was a trustee. (RT
22 2355.) Defense counsel further got Samuelson to admit that he
23 had seen Greg Winchell in custody with him and had heard "rumors"
24 that Greg Winchell was Terri Winchell's brother. (RT 2362.)

25 Defense counsel then extracted from Samuelson admissions
26 that he had been in protective custody from July 1981 until his
27 release to the honor farm more than four months later, and that

1 the reason he was placed there was that other inmates thought he
2 was "a snitch" or a "cop" and that he was there to elicit
3 information from people and then to give it to the prosecution.
4 Defense counsel also drew from Samuelson an admission that he was
5 placed in protective custody to insure his physical well-being
6 from other inmates, and that he now had what was called "a snitch
7 jacket." Samuelson admitted that he was immediately placed back
8 into protective custody upon his return to jail in November 1982.
9 In making these admissions, Samuelson gratuitously explained that
10 certain inmates in the jail knew he was taking college courses as
11 an administration of justice major, and had erroneously assumed
12 he was a cop. (RT 2364-66.)

13 Defense counsel then got Samuelson to concede that he
14 faced the possibility of going to prison with a snitch jacket,
15 and that in prison he would be placed in protective custody
16 segregated from everyone else. Samuelson acknowledged to defense
17 counsel that he was "interested in trying to avoid going to
18 prison," and that, to that end, he wrote a letter to the
19 prosecutor advising him that he could guarantee him a murder and
20 special circumstances conviction in petitioner's case. (RT 2366-
21 68.)

22 Defense counsel then got Samuelson to admit that, in the
23 letter, he had stated if the information in Morales' case was not
24 enough to persuade the prosecution to make a deal, he also put in
25 the letter to the prosecutor that he also had information on
26 another death penalty case against James Mahoney, information on
27 "many" drug sales in North Stockton, and some of the biggest

1 dealers in town. Defense counsel evoked from Samuelson an
2 admission that he "was pulling out all stops and offering just
3 about any sort of information" he could. (RT 2368-70.) Defense
4 counsel then concluded his cross-examination by going over the
5 prosecution's promise of recommendation of a year in county jail,
6 and the likelihood that Samuelson would have little time left to
7 serve if that were his sentence on both his theft and forgery
8 charges and his probation violation. Counsel then implied
9 through questioning, and Samuelson did not testify otherwise,
10 that Samuelson's cases had been put over until April 11, 1983
11 "[t]o see how you do here." (RT 2370-73.) The prosecutor
12 declined to conduct any redirect questioning of Samuelson. (RT
13 2374.)

14 All of this laid the evidentiary groundwork for defense
15 counsel's eventual argument to the jury in closing that
16 Samuelson's testimony was not worthy of belief. One of defense
17 counsel's major themes to the jury was that "nobody puts him
18 [Morales] in the car. Nobody sees him in the car at the time
19 that Terri was -- was killed. In fact nobody ever saw him get
20 into the car from the testimony that you've heard from the stand,
21 . . . obviously Samuelson, because he's usually in jail." (RT
22 2608-09.)

23 Defense counsel's argument to the jury thus focused on the
24 fact that "the testimony about what happened in the car is coming
25 in by way of what we call, in legal terms, an admission." (RT
26 2609.) Counsel emphasized to the jury that admissions, by
27 definition, did not themselves acknowledge guilt, but only tended

1 to prove guilt when considered with the other evidence, and that
2 it was entirely up to the jury to decide if petitioner made
3 admissions. In so doing, counsel stressed that California law
4 required the jurors to view petitioner's oral statements with
5 caution and skepticism because of the possibility of
6 misapprehension, faulty recall, and misrepresentation. (RT 2609-
7 10.)

8 Defense counsel also emphasized to the jury that the
9 instructions concerning how the jury was to evaluate witness
10 credibility, twice singling out the fact that the credibility
11 instruction allowed the jury to consider Samuelson's two prior
12 felony convictions. (RT 2611-12.)

13 Defense counsel then focused on Samuelson's demeanor,
14 describing Samuelson as "the essence of a what you might call a
15 con man" (RT 2612:12-13), "very . . . streetwise, very
16 articulate," who had appeared to attempt to "ingratiate himself
17 with you [the jury] or the prosecution by throwing in little
18 things like how he's working in police administration . . . " (RT
19 2612:14-18), which counsel urged, reflected nothing more than the
20 fact that Samuelson was "attempting to educate himself in terms
21 of perhaps being a little more sophisticated [and] . . . keeping
22 out of trouble." (RT 2612:25-26.) Defense counsel summed up
23 Samuelson's testimony and "the way he talked" about certain
24 things as giving the "impression that he knows his way around the
25 courts and is a pretty manipulative sort of person." (RT 2613:1-
26 3.)

27

1 Defense counsel then went straight into an attack on
2 Samuelson's testimony that he was not predisposed to following
3 anyone's criminal case but his own. Counsel quoted to the jury
4 Samuelson's testimony that "I don't like to become too familiar
5 with too many cases other than my own" and impeached it with
6 Samuelson's written statements to the prosecutor, revealing that
7 "he was terribly interested in a number of cases, Mr. Morales'
8 case, another death penalty case, cases involving drug sales in
9 north Stockton involving several dealers." (RT 2613:9-14.) Thus,
10 counsel directly called into "question his [Samuelson's]
11 statements about not being too familiar and not hearing things in
12 jail about the case prior to testifying." (RT 2613:15-17.)
13 Counsel stressed that "news about what goes on at the jail and
14 about people at the jail certainly gets around a lot more than
15 Mr. Samuelson would lead us to believe" given that Samuelson
16 himself testified that a "rumor had been spread throughout the
17 jail" about Samuelson so that "he needed to be put in protective
18 custody." (RT 2613.)

19 Defense counsel also sought to depict Samuelson as
20 desperately using this case to avoid going to prison for 13
21 years. Counsel began by directly challenging Samuelson's
22 testimony that he thought he had a 50/50 chance of beating the
23 charges against him: "And yet if he had that good a chance of
24 beating the charges, I wonder why he is in such desperation
25 indicated he could testify in three or four more different
26 cases." (RT 2614:1-3.) Counsel explained: "It's obvious, I
27

1 think, he has a bias, an interest and a motive. He said he was
2 looking -- the most he could get was 13 years." (RT 2614:8-10.)

3 Counsel explained to the jury that despite Samuelson's
4 testimony to the effect that he might not go to prison, the fact
5 that Samuelson had a prior record where he "almost" went to
6 prison and had to waive five months time in custody in order to
7 do so, and then was picked up again after only five months out of
8 custody, "indicates he was in pretty hot water and that he
9 certainly didn't want to go to prison. And he didn't want to go
10 to prison with a snitch jacket." (RT 2614:11-19.)

11 Defense counsel thus summed up Samuelson's interest and
12 bias by asking the jury to take an objective look at what
13 Samuelson was facing:

14 "So I think in terms of how much of an interest he has
15 in coming through for the prosecution can be determined by
16 what he was facing, which was certainly not only a lot of
17 time, but under the circumstances of him being an
18 informant or a snitch or whatever you want to call him,
19 the time he was doing was going to be time that I don't
20 think he was looking forward to." (RT 2614:20-26.)

21 Defense counsel then sought to portray Samuelson's
22 testimony as fabricated and specifically tailored by Samuelson to
23 support a torture murder special circumstance allegation.
24 Counsel began by seizing upon the prosecutor's characterization
25 of Samuelson as a "jailhouse lawyer" during the prosecutor's
26
27

1 opening argument.¹³ Counsel stated to the jury: "I think Mr.
2 Garber's assessment of him as a jailhouse lawyer is pretty good."
3 (RT 2615:4-5.) Counsel explained this agreement by stating that
4 some of Samuelson's testimony presented a "pretty good case for
5 torture," and was so good that it appeared "tailored" to prove
6 "torture and special circumstances." (RT 2615:2-13.)

7 As counsel emphasized to the jury that Samuelson had put
8 in his letter to the prosecutor that he "could guarantee a first
9 degree murder conviction with special circumstances" and asked
10 the jury to think about why Samuelson put that in the letter.
11 Counsel then suggested to the jury that "maybe being a jailhouse
12 lawyer, he's looked up a little bit of the law in the jail and
13 knows what some of the elements are of first degree murder and
14 special circumstances?" (RT 2615:15-18.)

15 Counsel then suggested that proof that Samuelson's
16 testimony was fabricated as a result of research Samuelson must
17 have done could be found in the fact that his testimony was
18 contradicted by the physical evidence of the murder itself.
19 Counsel pointed out to the jury that Samuelson had testified that
20 petitioner had rendered Terri Winchell unconscious before he
21 started hitting her with the hammer. Counsel explained: ". . .
22 if that were true, then that sort of does look like torture. If
23

24 13. During the prosecutor's opening argument, he urged
25 the jury to believe that petitioner had actually approached
26 Samuelson based on evidence that Samuelson was "sort of a
27 jailhouse lawyer," and "before you know it, Mike Morales is
telling Bruce Samuelson about his case. And I submit this is
pretty logical and understandable." (RT 2560:6, 2560:14-17.)

1 a person is unconscious, what's the purpose of hitting him?" (RT
2 2615:26-28.)

3 Counsel then sought to convince the jury that the
4 testimony was not true because it conflicted with the testimony
5 of other witnesses and the physical evidence of the murder.
6 Counsel pointed out that Samuelson's testimony that petitioner
7 had strangled Terri Winchell for about a minute to minute and a
8 half until she was unconscious was contradicted by the
9 pathologist's testimony that "he saw nothing wrong with the neck,
10 no bruising, no lacerations." (RT 2616:1-12.)

11 After counsel attacked the credibility of petitioner's
12 girlfriend and roommate as to additional admissions made by
13 petitioner, counsel asserted to the jury that their collective
14 accounts reflected "three different versions here" that did not
15 amount to proof beyond a reasonable doubt. (RT 2630:3-11.)
16 Counsel then returned to his argument that Samuelson's "little
17 story" was tailored to meet "a torture sort of theory," which
18 Samuelson must have "learned from his law books or his
19 administration of justice courses." (RT 2630:12-17.) He concluded
20 his remarks as to Samuelson by pointing out that Samuelson may
21 have gotten the law right, but he got the facts wrong when he
22 testified that the knife was put in the refrigerator and the
23 evidence showed that it was the hammer that was discovered in the
24 refrigerator. (RT 2630:18-25.)

25 Any alleged undisclosed distinction between a guaranteed
26 county jail sentence and a recommended county jail sentence for
27 Bruce Samuelson cannot, on the above-described record, create

1 reasonable doubt that did not otherwise exist with respect to the
2 jury's finding of guilt. It is clear that the defense had been
3 made sufficiently aware of numerous details concerning
4 Samuelson's background so as to allow the defense to conduct a
5 detailed cross-examination and to argue that Samuelson's
6 unresolved charges and probation violation gave him an incentive
7 to fabricate and color his testimony in the light most favorable
8 to the prosecution so as to increase the likelihood of him
9 receiving the recommended county jail sentence at the time of his
10 sentencing.

11 Given this record, if the jury knew that the proposed jail
12 sentence was somehow guaranteed by the prosecution, such a
13 disclosure would have done little to strengthen the attack
14 actually mounted against Samuelson's credibility. Indeed, it was
15 the fact that the proposed sentence was not guaranteed that
16 formed the evidentiary basis of the defense claim that Samuelson
17 was lying in an attempt to gain favor for himself at his then-
18 upcoming burglary probation violation hearing and auto
19 theft/forgery pretrial conference. If the sentence was
20 guaranteed, then the defense would have been without the
21 evidentiary basis to argue Samuelson had testified falsely in
22 hopes of currying favor with the prosecutor and the sentencing
23 judge, because the guaranteed sentence would not have been in any
24 way contingent on currying favor with anyone.

25 On this record, and giving petitioner the benefit of the
26 doubt, the most one can say about any alleged undisclosed
27 distinction between a recommended county jail sentence and a

1 guaranteed county jail sentence is that such a revelation "might
2 have helped the defense or might have affected the outcome of the
3 trial." United States v. Agurs, 427 U.S. at 109-110, id. at 112
4 n.20. Such evidence, however, is not material within the meaning
5 of the Constitution. It cannot be said that the alleged
6 undisclosed evidence made the prosecution's "case much stronger,
7 and the defense case much weaker, than the full facts would have
8 suggested." Kyles v. Whitley, 115 S. Ct. at 1575. Any deviation
9 from this rule would require the creation of a new rule of law in
10 violation of Teague v. Lane, 489 U.S. 288 (1989). Petitioner
11 cannot obtain an evidentiary hearing on this claim and the claim
12 should be denied on its merits.

13 In his skeletal motion for an evidentiary hearing
14 petitioner points to a handful of documents that -- he says --
15 entitle him to an evidentiary hearing. He gives no explanation
16 for the relevancy or importance of any of these documents, and
17 indeed makes no specific reference to their individual relevance.
18 Apparently petitioner (through his counsel) would prefer to have
19 respondent's counsel or the court do the work of actually
20 analyzing the claims. But petitioner's utter failure to present
21 any kind of coherent argument as to specifically why he is
22 entitled to a hearing renders these claims conclusory and wholly
23 devoid of specifics, such that an evidentiary hearing is not
24 necessary. Campbell v. Wood, 18 F.3d at 679. Indeed, as
25 respondent will show, the items identified by petitioner do not
26 entitle him to an evidentiary hearing.

27

1 Exhibit 1 consist of the transcript of an interview of
2 Bruce Samuelson. The interview was conducted on August 4, 1993
3 by the California Attorney General's Office. During the
4 interview, Samuelson states he has not reviewed any materials or
5 documents regarding the case in the last decade. Samuelson says
6 he "went into the hole" because he has a temper and wanted to
7 avoid fighting, and he could protect his belongings -- including
8 his court papers -- if he was removed from the general
9 population. Ex. 1 at 9-12.

10 Samuelson was aware of claims that he had been planted to
11 obtain incriminating evidence from petitioner. Those claims were
12 untrue. Ex. 1 at 13. Samuelson did not even know who petitioner
13 was until asked about petitioner by another inmate, possibly an
14 inmate named "Stony." Ex. 1 at 13. This inmate asked whether
15 petitioner was in "the hole." When Samuelson asked petitioner if
16 he was Mike Morales, petitioner reacted in a hostile manner. Ex.
17 1 at 15.

18 Samuelson describes the configuration of this portion of
19 the jail. Samuelson's cell was located diagonally in relation to
20 petitioner's cell. Ex. 1 at 16-17.

21 Samuelson explained how he became acquainted with
22 petitioner. Petitioner drew pictures and displayed them to other
23 inmates. Samuelson admired these drawing and petitioner offered
24 to draw something for Samuelson. Ex. 1 at 18.

25 Samuelson was busy at work on his own case when petitioner
26 began questioning Samuelson about Samuelson's case. Ex. 1 at 19.
27 Petitioner then asked Samuelson technical and supposedly

1 hypothetical questions such as, if a deceased was stabbed,
2 whether bleeding would occur. Samuelson said he would ask a
3 doctor friend. Ex. 1 at 20. Petitioner later returned to
4 question Samuelson, when petitioner described the murder in
5 detail. Ex. 1 at 50.

6 At this point Samuelson and petitioner began conversing in
7 Spanish because petitioner feared other inmates would eavesdrop.
8 Ex. 1 at 21. Both men were conversant in Spanish. Ex. 1 at 23.
9 The two would also communicate with written notes. Ex. 1 at 25.
10 They also wanted to talk at night to avoid other inmates. Ex. 1
11 at 25.

12 Petitioner asked Samuelson for help with petitioner's
13 case. Samuelson agreed, knowing nothing about petitioner's case.
14 Ex. 1 at 21.

15 As petitioner was describing the dead person and the
16 stabbing, he added more details. Ex. 1 at 23.

17 Petitioner discussed his homosexual cousin, and claimed
18 his cousin was doing time for the same crime as petitioner. Ex.
19 1 at 27.

20 Petitioner told Samuelson the background of the crime --
21 that the victim was in a romantic triangle involving petitioner's
22 homosexual cousin and the cousin's bisexual boyfriend.
23 Petitioner's cousin believed the victim was the instigator. Ex.
24 1 at 29. Petitioner wanted to teach the victim a lesson about
25 "messing with family." Ex. 1 at 29-30.

26 Petitioner explained to Samuelson how the victim was lured
27 away. Ex. 1 at 30.

1 Petitioner and Samuelson discussed whether the crime
2 involved kidnapping because the victim had voluntarily gotten
3 into the vehicle. Samuelson said it was a "gray area." Ex. 1 at
4 32.

5 Petitioner explained various factual details leading up to
6 the abduction. Ex. 1 at 33-35.

7 Samuelson questioned petitioner as to why they would have
8 gone to Lodi and Woodbridge from Stockton. Ex. 1 at 35-36.

9 Petitioner described the ruse that was used to explain
10 petitioner's presence in the car. Ex. 1 at 39-40.

11 Petitioner explained that the murder was planned to take
12 place within a particular time frame. Ex. 1 at 41.

13 Petitioner described the instruments he had with him: a
14 "vato" belt, a hammer and a knife. Ex. 1 at 42. Petitioner told
15 Samuelson he needed the knife and hammer "for punishment." Ex.
16 1 at 42.

17 Around this time petitioner asked Samuelson to serve as
18 petitioner's co-counsel. Ex. 1 at 42. Samuelson declined, but
19 said he would assist petitioner in preparation for trial. Ex. 1
20 at 43.

21 Samuelson got involved in petitioner's case. Ex. 1 at 43.
22 Samuelson wanted to know whether petitioner was disputing guilt
23 as a factual matter or instead intended a technical defense.
24 Petitioner claimed he "needed to fight technicalities." Ex. 1 at
25 43-44.

26 Samuelson had by now decided to tell someone in authority.
27 Samuelson was not seeking to benefit personally, but was

1 concerned there would otherwise be insufficient circumstantial
2 evidence to convict petitioner. Ex. 1 at 45.

3 Petitioner and Samuelson again discussed the facts,
4 including the weapons. Petitioner showed Samuelson a polaroid
5 photograph of petitioner holding the belt. When Samuelson asked
6 about the significance of the belt, petitioner said he had
7 attempted to strangle the victim with the belt. Ex. 1 at 45-46.

8 As petitioner described the drive to Lodi, Samuelson asked
9 for greater detail. Petitioner described Rocky giving him
10 predetermined signal that the crime could take place undetected.
11 Ex. 1 at 46.

12 Petitioner removed the belt, the hammer and knife that
13 were conceded under his shirt. Ex. 1 at 46.

14 Petitioner described in great detail how he killed the
15 victim. Ex. 1 at 47-49. Petitioner described why he used the
16 hammer rather than his fists -- it was "more fulfilling" and he
17 would avoid sustaining any bruises. Ex. 1 at 47.

18 Petitioner asked Samuelson whether he would be guilty of rape
19 if he sexually assaulted the victim while she was unconscious.
20 Ex. 1 at 49.

21 Samuelson was interested in obtaining information about
22 the case. Ex. 1 at 51.

23 Petitioner boasted that he would get away with the crime,
24 just as he had killed in the past and gotten away with it. Ex.
25 1 at 52.

26 Petitioner and Samuelson simulated asking trial-like
27 questions and answers. Petitioner was confident his cousin would

1 never testify against petitioner. Ex. 1 at 53. As part of this
2 mock trial, petitioner and Samuelson removed all the likely
3 witnesses who would testify against petitioner. Ex. 1 at 55.

4 They discussed petitioner's contradiction statements about
5 the location of the knife and the hammer. Ex. 1 at 56.

6 Petitioner and Samuelson discussed implicably petitioner's
7 version as the killer in the event his cousin elected to testify
8 against petitioner. Ex. 1 at 61.

9 Petitioner reiterated his request that Samuelson help him
10 in court. Ex. 1 at 61-62.

11 Petitioner reiterated his intent in protecting his cousin
12 as the motive for the murder. Ex. 1 at 62-63.

13 Petitioner predicted to Samuelson he will succeed in
14 having the trial venue changed because the case had been
15 published in newspapers. Samuelson reiterated that he was
16 unfamiliar with any publicity about the case. Ex. 1 at 64-65.

17 The two discussed the ethnic profile in jury profiles in
18 potential trial locations. Ex. 1 at 65.

19 Petitioner showed Samuelson where he has hidden a shank
20 within his cell. Samuelson now fears retaliation by petitioner if
21 Samuelson becomes an informant. Ex. 1 at 67. Samuelson
22 subsequently told jail officials about the hidden shank.
23 Samuelson was then moved to a different jail. Ex. 1 at 68-69.

24 The more Samuelson talked to petitioner, the more
25 Samuelson realized he has a crucial witness -- especially since
26 he did not expect petitioner's cousin to incriminate petitioner.
27 Ex. 1 at 70

1 Petitioner and Samuelson discussed the applicability of a
2 robbery-murder in light of petitioner's theft of the victim's
3 jewelry. Ex. 1 at 74.

4 Samuelson described the term of his arrangement with the
5 district attorney's office. Ex. 1 at 87. He said there "was not
6 that much of a plea bargain," and described the agreement as
7 insubstantial. He was declined witness protection. Samuelson
8 thought he had gotten a bad deal. Ex. 1 at 87.

9 In short, Exhibit 1 offers no support for an evidentiary
10 hearing.

11 Petitioner also claims Exhibit 4 entitles him to an
12 evidentiary hearing. Mot. at 7. His reference to Exhibit 4 is
13 puzzling. Exhibit 4 is a summary of the results of the district
14 attorney's polygraph examination of Samuelson. According to the
15 district attorney's polygraph examiner, Samuelson

16 was being truthful; that he did obtain the information
17 that he gave in a supplement to the Stockton Police
18 Department from Morales himself and he did not get it from
19 any other source.

20 Thus, Exhibit 4, squarely confirming that Samuelson's account was
21 truthful, and offers no support for petitioner's request for an
22 evidentiary hearing.

23 Exhibit 5 is merely a copy of the questions asked of
24 petitioner during the polygraph examination, and the raw chart of
25 petitioner's examination. Exhibit 5 thus offers no support for
26 petitioner's request for an evidentiary hearing.

1 In 1994 petitioner retained an expert to analyze the
2 district attorney's polygraph examination. Exhibit 6 is the
3 report of petitioner's expert, who determined that "it cannot be
4 concluded Samuelson was truthful" when he answered one of the
5 questions put to him. Ex. at 3.

6 The foregoing demonstrates that petitioner cannot offer
7 this court any significant evidence impeaching Samuelson or
8 undermining his trial testimony. On the contrary, petitioner
9 points to things that only confirm the truthfulness of
10 Samuelson's trial testimony, such as his recent interview by
11 respondent. And petitioner's discussion of polygraph evidence is
12 fundamentally misplaced here because the United States Supreme
13 Court has squarely held that there is simply no consensus that
14 polygraph evidence is reliable. United States v. Scheffer, ____
15 U.S. ____, [1996 WL 141151, March 31, 1998]. Ironically, however,
16 in this case a polygraph examination of Samuelson only reinforces
17 his credibility. And Exhibit 6, the opinion of petitioner's
18 polygraph examiner, does not even consist of an examination of
19 petitioner with an accompanying conclusion that petitioner is
20 answering untruthfully. It is merely the second-hand
21 interpretation by petitioner's expert of the test conducted by
22 the district attorney. And even petitioner's expert will only
23 say that, as to one of petitioner's responses, "it cannot be
24 concluded Samuelson was truthful." Ex. 6 at 3. Thus
25 petitioner's expert does not even the truthfulness of a variety
26 of petitioner's answers during the polygraph examination,
27

1 including Samuelson's answer that petitioner had confessed to him
2 (question 39 of the examination).

3
4 **E. Claim 5. Knowing Use Of Perjured Testimony (Samuelson)**

5 In petitioner's fifth claim for relief (pet. at 44-55), he
6 alleges that the prosecution knowingly used perjured testimony by
7 witness Bruce Samuelson, thereby denying petitioner his rights in
8 violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.
9 In particular support of this legal claim, petitioner alleges
10 that "it is entirely probable that the facts testified to by
11 Samuelson were provided to him by the District Attorney" (pet. at
12 47:23-24), because at petitioner's trial Bruce Samuelson
13 testified that petitioner's "confession began on November 15,
14 1982." (Pet. at 45:25-26.) Petitioner alleges that, in
15 contradiction of this testimony, Deputy District Attorney Bernard
16 Garber made an undated handwritten entry in Samuelson's case file
17 on an district attorney "evaluation" form that "had to have been
18 made on or before November 15, 1982" that stated: "PX waived - D
19 to plead to Count 1 + 1 count of 470 for local. See BG re details
20 (D is to testify in Peo v. Morales - 187 w/ specials, D to remain
21 in custody) BG." (Pet. at 46:9-17.) This undated entry had to
22 have been made on or before November 15, petitioner alleges,
23 because at the bottom of this evaluation form there appears "a
24 stamp which reads: 'Receipt of a copy of this document is hereby
25 acknowledged:' followed by the handwritten entry: 'to D' and
26 signed 'BG 11/15,'" (pet. at 46:20-23), "or else the District
27 Attorney simply provided Samuelson with a copy of the blank form,